

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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9	RICHARD J. ROBERSON,)	
10	Plaintiff,)	No. CV-05-3066-CI
11	v.)	ORDER GRANTING MOTION TO
12	JO ANNE B. BARNHART,)	SUPPLEMENT, DENYING
13	Commissioner of Social)	PLAINTIFF'S MOTION FOR SUMMARY
14	Security,)	JUDGMENT, GRANTING DEFENDANT'S
15	Defendant.)	MOTION FOR SUMMARY JUDGMENT,
)	AND DIRECTING ENTRY OF
)	JUDGMENT FOR DEFENDANT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 20), submitted for disposition without oral argument on February 27, 2006. Also before the court is Plaintiff's Motion to Supplement the record. (Ct. Rec. 15.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, 48-years-old at the time of the administrative hearing, completed the tenth grade and had past work experience as

1 a forklift operator and laborer. He filed a second¹ application for
2 Supplemental Security Income (SSI) benefits on May 16, 2002,
3 alleging disability as of May 16, 2002, due to back and neck injury
4 and pain, bipolar disorder and depression. (Tr. at 19.) Following
5 a denial of benefits at the initial stage and on reconsideration, a
6 hearing was held before Administrative Law Judge Ruperta M. Alexis
7 (ALJ). In December 2004, the ALJ denied benefits; review was denied
8 by the Appeals Council. This appeal followed. Jurisdiction is
9 appropriate pursuant to 42 U.S.C. § 405(g).

10 ADMINISTRATIVE DECISION

11 The ALJ concluded Plaintiff had not engaged in substantial
12 gainful activity and suffered from severe impairments, including
13 chronic low back pain, substance addiction, and bipolar disorder,
14 pancreatitis,² and hepatitis C, but those impairments did not meet
15 the Listings. (Tr. at 26.) Plaintiff's testimony was not found
16 fully credible. Not considering the substance abuse, the ALJ
17 further concluded Plaintiff suffers from severe chronic low back
18 pain, bipolar disorder, pancreatitis, and hepatitis C. (Tr. at 23.)

19 ¹Plaintiff previously filed an application for benefits on
20 September 18, 2000. (Tr. at 18.) He appealed the denial of
21 benefits to the hearing level, but withdrew his request for a
22 hearing. The ALJ did not reopen that prior application and there
23 has been no challenge to that finding. Thus, the date at issue is
24 post May 16, 2002. (Tr. at 20.)

25 ²There are lab results dated January 2004 that did not support
26 a diagnosis of pancreatitis; instead the reports reflected Plaintiff
27 was suffering from H. Pylori bacteria. (Tr. at 304.)

1 Mentally and without consideration of substance addiction, the ALJ
2 concluded Plaintiff had moderate limitations in activities of daily
3 living, social functioning, concentration, persistence and pace and
4 no episodes of decompensation. The ALJ found he had a residual
5 capacity for light work that involved detailed but not complex tasks
6 without close interaction with the general public. (Tr. at 26.)
7 The ALJ concluded Plaintiff could perform his past relevant work as
8 a forklift operator and, therefore, was not disabled. (Tr. at 30.)

9 ISSUES

10 The question presented is whether there was substantial
11 evidence to support the ALJ's decision denying benefits and, if so,
12 whether that decision was based on proper legal standards.
13 Plaintiff contends the ALJ erred when she (1) improperly rejected
14 probative medical evidence and failed to include limitations in
15 assessing residual functional capacity; and (2) failed to outline
16 the demands of Plaintiff's past work as a forklift driver.

17 STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
19 court set out the standard of review:

20 The decision of the Commissioner may be reversed only if
21 it is not supported by substantial evidence or if it is
22 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
23 1097 (9th Cir. 1999). Substantial evidence is defined as
24 being more than a mere scintilla, but less than a
25 preponderance. *Id.* at 1098. Put another way, substantial
26 evidence is such relevant evidence as a reasonable mind
27 might accept as adequate to support a conclusion.
28 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
evidence is susceptible to more than one rational
interpretation, the court may not substitute its judgment
for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Comm'r of Soc. Sec. Admin. 169 F.3d 595, 599
(9th Cir. 1999).

The ALJ is responsible for determining credibility,

1 resolving conflicts in medical testimony, and resolving
 2 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 3 Cir. 1995). The ALJ's determinations of law are reviewed
 4 *de novo*, although deference is owed to a reasonable
 5 construction of the applicable statutes. *McNatt v. Apfel*,
 6 201 F.3d 1084, 1087 (9th Cir. 2000).

7 SEQUENTIAL PROCESS

8 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 9 requirements necessary to establish disability:

10 Under the Social Security Act, individuals who are
 11 "under a disability" are eligible to receive benefits. 42
 12 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 13 medically determinable physical or mental impairment"
 14 which prevents one from engaging "in any substantial
 15 gainful activity" and is expected to result in death or
 16 last "for a continuous period of not less than 12 months."
 17 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 18 from "anatomical, physiological, or psychological
 19 abnormalities which are demonstrable by medically
 20 acceptable clinical and laboratory diagnostic techniques."
 21 42 U.S.C. § 423(d)(3). The Act also provides that a
 22 claimant will be eligible for benefits only if his
 23 impairments "are of such severity that he is not only
 24 unable to do his previous work but cannot, considering his
 25 age, education and work experience, engage in any other
 26 kind of substantial gainful work which exists in the
 27 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 28 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential
 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

25 MOTION TO SUPPLEMENT RECORD

26 Plaintiff moves to supplement the administrative record with a
 27 Mental Residual Functional Capacity Assessment completed in October

1 2000 by a DDS physician. Plaintiff contends the ALJ specifically
2 relied on this report in her analysis of the current application,
3 but it was not included in the administrative record. (Tr. at 25.)
4 Defendant objected in the response to the Motion to Supplement, but
5 withdrew its objection in its brief in support of Summary Judgment.
6 (Ct. Rec. 21 at 16.)

7 In her opinion, the ALJ noted "[i]n reviewing the medical
8 evidence, I may occasionally refer to items from the prior file.
9 These references are only to provide background and are not intended
10 to reopen the prior application. The reconsideration determination
11 in the prior decision remains that final decision of the
12 Commissioner on that application." (Tr. at 20.) Later in her
13 opinion, the ALJ noted:

14 In determining the claimant's mental functioning I have
15 considered the statement of the State Agency from the
16 prior application as the current application did not have
17 any analysis due to the claimant's failure to cooperate.
18 I have also considered the fact that there is no evidence
19 of any significant change in the claimant's mental
20 capacity from 2001, when the claimant was able to perform
21 substantial gainful activity.

22 (Tr. at 25.) Thus, specific reference was made to the DDS
23 physician's RFC from the prior application; to the extent such
24 evidence is relevant to this court's review of the ALJ's opinion,
25 the report is properly before the court. Plaintiff's unopposed
26 Motion to Supplement (Ct. Rec. 15) is **GRANTED**.

27 ANALYSIS

28 1. Treating and Examining Physicians

Plaintiff contends the ALJ improperly rejected the opinions of
Drs. Birdlebough, Avery, and Smith. Dr. Birdlebough evaluated

1 Plaintiff and based on his diagnoses, assigned a global assessment
2 of functioning score of 45, indicative of serious limitations.
3 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV),
4 at 32 (1995). Plaintiff contends that assessment is consistent with
5 other medical evidence. Physically, Plaintiff contends examining
6 doctors diagnosed low back pain, acute and chronic. (Tr. at 144,
7 150, 198-199.) Finally, Plaintiff contends the ALJ did not consider
8 the traumatic damage to his left arm and hand following the stabbing
9 incident in June 2002 and the fatigue that was secondary to the
10 hepatitis C diagnosis. (Tr. at 258, 342.) Defendant responds the
11 ALJ based her determination of his RFC on the complete medical
12 record and properly included the physical and mental limitations
13 supported by the record.

14 In her opinion, the ALJ concluded Plaintiff, separate from the
15 effects of drug and alcohol abuse, would be moderately limited in
16 his activities of daily living, moderately limited in social
17 functioning, and moderately limited in concentration, persistence
18 and pace. (Tr. at 23.) She also noted those limitations represented
19 no change from his mental residual capacity found during the
20 processing of the prior application and prior to substantial gainful
21 activity performed in 2001-02. (Tr. at 25.)

22 The record discloses the moderate limitations noted by the ALJ
23 in her opinion were supported by, and consistent with, the moderate
24 mental limitations noted and more specifically described by a DDS
25 physician in 2000, but not as severe as those found by treating and
26 examining mental health professionals in 2002-2003. Dr. Birdlebough
27 examined Plaintiff in April 2002 and noted a GAF of 45. (Tr. at

1 168.) Plaintiff, however, does not dispute he was abusing cocaine
2 and alcohol at that time. Dr. Birdlebough examined Plaintiff again
3 in May and June 2002 and noted an improvement in his psychotic
4 condition, but not the depression. (Tr. at 164, 165.) Mental
5 health professionals described marked and moderate limitations in
6 June 2002. (Tr. at 230-231.) Plaintiff contends these assessments
7 were made after remission of substance abuse; however, Plaintiff was
8 described as "actively addicted" in August 2002 and recommended for
9 inpatient treatment as a condition of GAU benefits. (Tr. at 255.)
10 There is no evidence such treatment occurred. Again in September
11 2003, Plaintiff was noted to have episodic use of cocaine (30 grams
12 daily) and in January 2004, had active needle marks. (Tr. at 301-
13 303.) Thus, there is no basis with respect to treatment records in
14 2002 to separate the mental limitations from the effects of
15 substance abuse, except to the extent found by the ALJ.

16 The Veteran's Administration awarded Plaintiff a full
17 disability based on his bipolar and post-traumatic stress disorders.
18 (Tr. at 139, 140.) In *McCartey v. Massanari*, 298 F.3d 1072 (9th Cir.
19 2002), the Ninth Circuit addressed the issue of the weight to be
20 given to a VA disability assessment. Under *McCartey*, a VA rating of
21 disability will not necessarily compel a finding of disability as to
22 Social Security benefits, 20 C.F.R. § 404.1504, but the ALJ must
23 consider the VA's finding in reaching his decision. *Id.* at 1076.
24 As noted further:

25 Both programs evaluate **a claimant's ability to perform**
26 **full-time work in the national economy on a sustained and**
27 **continuing basis**; both focus on analyzing a claimant's
28 functional limitations; and both require claimants to
present extensive medical documentation in support of
their claims. Compare 38 C.F.R. § 4.1 et seq. (VA

1 ratings) with 20 C.F.R. § 404.1 et seq (Social Security
2 Disability). Both programs have a detailed regulatory
3 scheme that promotes consistency in adjudication of
4 claims. Both are administered by the federal government,
5 and they share a common incentive to weed out meritless
6 claims. The VA criteria for evaluating disability are
7 very specific and translate easily into SSA's disability
8 framework. Because the VA and SSA criteria for
determining disability are not identical, however, the ALJ
may give less weight to a VA disability rating if he gives
**persuasive, specific, valid reasons for doing so that are
supported by the record.** See *Chambliss* [v. *Massanari*, 269
F.3d 520], at 522 [(5th Cir. 2001)] (ALJ need not give
great weight to a VA rating if he "adequately explain[s]
the valid reasons for not doing so").

9 *McCartey*, at 1075 (emphasis added). Here, the ALJ rejected the VA
10 findings because they were not supported by a rationale and made no
11 reference to Plaintiff's ongoing substance addiction. (Tr. at 24.)
12 Moreover, the records used to support the VA award involved
13 treatment in July 2001 just prior to Plaintiff re-entering the work
14 force and performing substantial gainful activity for a year. (Tr.
15 at 140.) Thus, there was no error as to the ALJ's description of
16 Plaintiff's residual capacity.

17 Plaintiff also contends the ALJ did not properly reject the
18 opinions of the examining and treating physician with respect to
19 physical impairments. He contends he was precluded from work due to
20 physical impairments, including chronic low back pain, fatigue, and
21 residual damage to his left hand. Plaintiff relies on the opinions
22 of treating and examining physicians, including Drs. DeGooyer,
23 emergency room physicians, and Smith.

24 In a disability proceeding, the treating physician's opinion is
25 given special weight because of his familiarity with the claimant
26 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05
27 (9th Cir. 1989). If the treating physician's opinions are not

1 contradicted, they can be rejected only with "clear and convincing"
2 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
3 contradicted, the ALJ may reject the opinion if he states specific,
4 legitimate reasons that are supported by substantial evidence. See
5 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
6 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating
7 physician's uncontradicted medical opinion will not receive
8 "controlling weight" unless it is "well-supported by medically
9 acceptable clinical and laboratory diagnostic techniques," Social
10 Security Ruling 96-2p, it can nonetheless be rejected only for
11 "'clear and convincing' reasons supported by substantial evidence in
12 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
13 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
14 1998)). Furthermore, a treating physician's opinion "on the ultimate
15 issue of disability" must itself be credited if uncontroverted and
16 supported by medically accepted diagnostic techniques unless it is
17 rejected with clear and convincing reasons. *Holohan*, 246 F.3d at
18 1202-03. Historically, the courts have recognized conflicting
19 medical evidence, the absence of regular medical treatment during
20 the alleged period of disability, and the lack of medical support a
21 doctor's report based substantially on a claimant's subjective
22 complaints of pain, as specific, legitimate reasons for disregarding
23 the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64;
24 *Fair*, 885 F.2d at 604.

25 Plaintiff asserts his low back pain flared after a slip and
26 fall in December 2001. (Tr. at 144.) Plaintiff was treated at the
27 emergency room several times in April 2002; there was diffuse

1 tenderness, no deformity or swelling, no point tenderness, no
2 radiculopathy, good reflexes and normal strength and tone.
3 Plaintiff was able to heel-walk and straight leg raising was
4 negative. Plaintiff was treated conservatively and counseled on
5 exercise and weight loss. (Tr. at 144, 147, 150, 198-99.)
6 Chiropractor DeGooyer assumed Plaintiff's care in May and June 2002.
7 (Tr. at 156.) X-rays revealed subluxation/strain/sprain at T4-T9, L2
8 and iliac levels. (Tr. at 156.) Dr. DeGooyer noted postural
9 limitations, with guarded prognosis, and inability to work. (Tr. at
10 259.) Plaintiff was referred to physical therapy, but failed to
11 show up. (Tr. at 153.) No further treatment was provided for back
12 pain. At an examination by the VA in September 2003, the records
13 reflect no complaints about musculoskeletal issues. (Tr. at 309.)
14 Even assuming the one-year durational requirement was met, there is
15 no evidence in light of the limited medical records to contradict
16 the ALJ's conclusion Plaintiff was able to lift twenty pounds
17 occasionally and ten pounds frequently. (Tr. at 25.)

18 Plaintiff contends the injury to his hand and resulting
19 limitations were not considered by the ALJ. The ALJ noted Plaintiff
20 suffered a stab wound to his left arm on June 13, 2002, and was
21 found to have a partial radial nerve laceration. (Tr. at 21.) The
22 ALJ further noted electrical studies showed that the claimant did
23 not have an obvious nerve lesion and the treating physician opined
24 Plaintiff would be limited for a period of 12 weeks due to the
25 injury. (Tr. at 21.) These findings are supported by the record.
26 (Tr. at 245, 258.) The final recorded note indicated there was some
27 question whether the injury was to the muscle or the nerve. It was

1 recommended Plaintiff be reevaluated in six weeks. (Tr. at 245.)
2 There is no medical record the reassessment occurred. Moreover,
3 during his intake with the VA in September 2003, no mention was made
4 of limited hand or arm function. (Tr. at 301.) Thus, the ALJ's
5 conclusion Plaintiff's hand and arm injury was non-severe is
6 supported by the record.

7 Finally, Plaintiff contends he suffers from severe fatigue
8 associated with the diagnosis of hepatitis C. He relies on the
9 testimony of his roommate who testified Plaintiff was unable to
10 paint the interior of his home. The medical record reflects
11 Plaintiff complained of fatigue to VA providers in January 2004 and
12 they suggested a trial of B12 supplement. (Tr. at 302.) There are
13 no further medical records to support allegations of excessive
14 fatigue; additionally, the development of fatigue was well beyond
15 the alleged onset date of May 2002. The ALJ noted she considered
16 the roommate's testimony and limited Plaintiff to light work. (Tr.
17 at 25.) There was no error.

18 2. Analysis of Past Relevant Work

19 Plaintiff contends the ALJ failed to properly analyze the
20 demands of his past relevant work in light of the mental limitations
21 she found. Relying on SSR 82-62, Plaintiff contends the ALJ failed
22 to analyze the precise description of the particular job duties
23 which would produce tension and anxiety, including the necessity for
24 speed, precision, independent judgment and working with others.
25 Defendant responds Plaintiff failed to meet his burden of
26 demonstrating he was unable to return to past relevant work, noting
27 the ALJ correctly found the job, as performed by Plaintiff in 2001-

1 2002, accommodated his need for non-complex tasks and lack of
2 interaction with the public.

3 The ALJ found Plaintiff's past relevant work as he performed it
4 did not require lifting more than ten pounds or interaction with the
5 public. (Tr. at 25, 89.) Plaintiff represented he quit the job
6 because of back pain, but there is no medical evidence to establish
7 disabling musculoskeletal pain in 2003. Moreover, Plaintiff failed
8 to follow the recommended physical therapy, exercise and weight loss
9 programs, but relied on illegal substances to control his pain.
10 Additionally, there is no evidence Plaintiff's mental condition
11 after May 2002 substantially deteriorated, separate and apart from
12 his continuing use of illegal substances, from the mental
13 limitations which were present while performing substantial gainful
14 activity in 2001-2002. The court concludes the ALJ did not err.
15 Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion to Supplement (**Ct. Rec. 15**) is **GRANTED**.

18 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
19 **DENIED**.

20 3. Defendant's Motion for Summary Judgment dismissal (**Ct.**
21 **Rec. 20**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED**
22 **WITH PREJUDICE**.

23 4. The District Court Executive is directed to file this
24 Order and provide a copy to counsel for Plaintiff and Defendant.
25 The file shall be **CLOSED** and judgment entered for Defendant.

26 DATED March 27, 2006.

27 S/ CYNTHIA IMBROGNO
28 UNITED STATES MAGISTRATE JUDGE